

NEW YORK UNIVERSITY SCHOOL OF LAW
CENTER ON CIVIL JUSTICE

**Rule 23 @ 50:
The 50th Anniversary of Rule 23**

AN ORAL HISTORY OF RULE 23:
An interview of Professor Arthur R. Miller
by Professor Samuel Issacharoff

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CENTER ON CIVIL JUSTICE
at NYU School of Law



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CENTER ON CIVIL JUSTICE 2016 FALL CONFERENCE

Rule 23 @ 50:

The 50th Anniversary of Rule 23

AN INTERVIEW OF PROFESSOR ARTHUR R. MILLER BY PROFESSOR SAMUEL ISSACHAROFF

Professor Miller was present at the creation and drafting of Rule 23 in 1966. Professor Issacharoff conducted an interview illuminating this history and the ethical issues that were anticipated at the time of drafting. The interview has been transcribed and appears here with light editing.

INTRODUCTION BY

Peter Zimroth

INTERVIEW BY

Arthur R. Miller and Samuel Issacharoff

EDITED BY

Peter Zimroth, Arthur R. Miller, Samuel Issacharoff,
and David Siffert

The entire conference was videotaped and is available on the Center's website at www.centeronciviljustice.org.

An Oral History of Rule 23

[START RECORDING]

PETER ZIMROTH: Good morning again, everybody. Nice to see everyone back. We have a special treat this morning, with Sam Issacharoff interviewing Arthur Miller. Arthur, as you all know, was there at the creation of Rule 23. Everybody in this room knows Sam and his prowess in the area of civil procedure, so I'm not going to say anything about that. I will just put a plug in that Sam is a scholar of very wide berth, not just in civil procedure, but also in law and democracy. You all know about Sam's work in that subject.

He's also a fabulous teacher; he's won teaching awards at every institution at which he's taught, and I can attest personally that he is a very powerful lawyer. I first met Sam when we were on opposite sides of the diet drug litigation, until the case settled, and then we were on the same side. And I can tell you, it's a lot better having Sam on your side than on the other side.

And what is there to say about Arthur? Arthur is a legend. Sam, what is there to say about Arthur?

PROFESSOR ARTHUR R. MILLER: [Moving his chair] I'm in the furniture business.

[Laughter]

ZIMROTH: I have a very fond connection with Arthur. We went to the same high school in Brooklyn. There's another Arthur Miller who went there. Isn't that right, Arthur?

MILLER: Yes, 10 years before I arrived, *Death of a Salesman* opened on Broadway, and I discovered we shared a name.

ZIMROTH: Right, but the important Arthur Miller from Abraham Lincoln High School is this one, right here. He is not only a giant in the field, but beloved. And he's won more awards than I can count, including an Emmy for his PBS series. I'm going to stop here because otherwise there won't be any time for the interview. Thanks.

PROFESSOR SAMUEL ISSACHAROFF: So it's me and you again.

MILLER: It's like watching a bad movie twice.

ISSACHAROFF: I think we've done this before.

MILLER: Not this, but others.

ISSACHAROFF: So I want to take us back to 1966, but first, let me take us back just a little bit earlier. One of the things that we tell our students is when you're trying to figure out where a rule, law, or constitutional provision comes from, you should first try to figure out what was wrong with what already existed. This is known as the Rule of Heydon's Case. It's Blackstone. In 1966, there was a package of reforms of all the joinder rules, not just Rule 23, although we will focus on that. It was only 25 years since the Federal Rules had been adapted in 1938. What was the perceived problem?

MILLER: You actually have to go back to '61, which is when the committee made the decision to look at Rules 17 through 25, the joinder rules. There was a sense that the text of the rules at that time was murky, indefinite, unclear, obscure, whatever you want to call it. And that judges and lawyers were having difficulty and creating inconsistencies in the application of some of those rules. Those rules were underused, and it was thought time to rationalize them, to tie them together better than they had been tied in the 30s, and to clarify the text to capture the 25 years of experience, and to insert that experience under the Federal Rules of Civil Procedure into the rules.

ISSACHAROFF: And with Rule 23 in particular, what was the perceived problem? You had this very elaborate language, "spurious," "true," and all these things that sound just bizarre today, but what was the perceived problem in the application?

MILLER: Well, that was it, Sam. Those three categories, "true," "hybrid," and "spurious," just didn't mean anything to most people. It was metaphysical. It was, again, indefinite, unclear. Rule 23 was underused. There were basic questions about how it worked that had produced inconsistency in the few cases that had been decided under Rule 23. So the rulemakers were saying, "Let's put this in plain English." The operative word was "functional." Let's make this functional, and let's capture what we have learned from '38 to the early '60s and insert it, which is what you find in 23(c) and 23(d).

ISSACHAROFF: I want to turn to the animating problem with Rule 23 and its relationship to the civil rights era. But before we get to that, just on a personal note: there were rule revisions and there was a difficult problem of procedural law, so today it seems obvious—you get Arthur Miller, of course. What else are you going to do? But, if I'm not mistaken, you were 28 years old or something, so I'm not even sure you were Arthur Miller back then. How did you get involved? Why you?

MILLER: I was very lucky to have Benjamin Kaplan as my procedure teacher. I fell in love with Ben just watching him, because his face was so expressive and his linguistics were so powerful; he could paint pictures with words. At the beginning of my second year at law school, Ben asked me to be his research assistant that following summer, something no current law student would ever do. To this day I remember, I'm on the phone with Ben, and I'm saying to myself, "I've got 60 years to practice law, one summer to work for Ben Kaplan. It's a no-brainer." So I go to work for Ben on copyright, which was his other love and became, actually, my first love. I go off to Cleary Gottlieb in New York. Get a chance to teach at Columbia and work on an international procedure project and some related Federal Rules of Civil Procedure.

ISSACHAROFF: Under Jack Weinstein.

MILLER: Under Jack Weinstein, my other mentor, and I think there was a lot of Machiavellian behind-the-scenes stuff. The key was they knew I was close to Ben. Ben treated me like a son, in effect, the summer I worked for him and in my third year. Ben was then the Reporter for the Federal Rules Advisory Committee. And if the Columbia Project was going to make federal rule proposals, what better cannon fodder would there be than sending me up to Cambridge to try and con Ben into bringing our proposals before the Committee—which is exactly what attracted me to the job. Ben was the carrot, plus the possibility of trying to teach.

And, sure enough, that was my mission. I went up to Cambridge with rule revisions on 4, 28, 44, 44.1, and all that stuff that nobody ever thinks about—at least not back then. And a pact with the devil was made. Ben would present these international procedure rules to the Committee if I would help him with the party rules. In other

words, I never left my status as a research assistant for Ben. And that enabled me to go to all the Rules Advisory Committee meetings, where they treated me as sort of an assistant to the reporter.

ISSACHAROFF: You were considerably younger than everybody else there.

MILLER: Yes. The closest person in age to me was Charles Alan Wright. I think Charlie was less than 10 years older than I was. I was 27 or 28, I think.

ISSACHAROFF: So, again, before we get to the substance, just to mark the way of marking the change in eras, are we talking about 10 guys in the back room?

MILLER: Well, it wasn't the back room.

[Laughter]

MILLER: The Chair of the Committee was Dean Acheson, a former Secretary of State of renown and the senior partner at Covington & Burling. So it wasn't the back room; it was an elegant conference room at Covington & Burling. But it was closed.

ISSACHAROFF: But it was closed. And there were about 10 of you, right?

MILLER: I'd say 15 or 16.

ISSACHAROFF: 15 or 16.

MILLER: No one else. Sometimes we'd meet at the Supreme Court building, but again in a closed room.

ISSACHAROFF: All men, just to belabor the obvious. It was a different period.

MILLER: Well, you can belabor the obvious even more. It was all white men.

ISSACHAROFF: So you started there. I have heard you say, and David Marcus has written on this, that the first and most central con-

cern on the Rule 23 side was, in some sense, legitimating the court role in the civil rights revolution, that *Brown* was in the room, as it were, for everyone.

MILLER: Absolutely right. It became clear that in the work on Rules 17 through 25, the centerpiece became Rule 23. That got the most attention. And within that centerpiece, the centerpiece was civil rights. Even though *Brown v. Board of Education*, as we know, was not a formal class action, class actions were being employed in the desegregation context—certainly by '62, when the Committee really started to focus on Rule 23—so it was the banner motivation for the revision.

ISSACHAROFF: Again, let's go back to what was the perceived problem, because this is something that we've talked about. And it is something that our students ask every year, when we teach together. Why do you need a (b)(2) class action if you can already get injunctive relief, especially in a world where you have *Parklane Hosiery* and preclusion laws? You can get everything you want out of an individual case. What were you trying to achieve by creating this (b)(2) class?

MILLER: The purpose of the (b)(2) class was simply, as was true of the remainder of the rule, to create a usable vehicle. The (b)(2) was thought necessary because there was no confidence, at that point, that simply because Mrs. Brown got an injunction against discriminatory conduct that a school board or a venal employer would apply that decree to every other member of the affected group. You didn't have *Parklane Hosiery* back then; you had mutuality of estoppel. So, to make sure that there really would be relief to the affected group and to forestall game playing in terms of extending the application of the decree, the (b)(2) was thought necessary. And there also was a recognition that if you put one parent up against the school board, or an organized political entity, it wouldn't work because of the disparity in resources.

ISSACHAROFF: So this is the pick-off problem?

MILLER: It's the pick-off-the-plaintiff problem. It's the uneven playing field. And they saw it in a very preliminary way in the employment context. Remember, this is before the Civil Rights Acts. But you could feel that what happened in *Brown* with regard to school desegregation had legs, and it was going to osmose into other contexts.

And you had to give the civil rights group a mobilizing capability, and the vehicle for doing that was the class action.

ISSACHAROFF: That's the story that I've heard over the years, and I want to press about whether that really wraps it up. You were in the shadow, let's say, of *Brown II*. "All deliberate speed." There was a sense that things weren't working. The courts had declared segregated schools unconstitutional, but all schools were still segregated, and the Civil Rights Acts had been stalled in Congress.

One of the questions that I've wondered about is whether you had a sense that this would give more legitimacy to the courts' taking over institutions or to the courts' playing a heavier hand than just simply the declaration. Because it's interesting that even the language of (b)(2) says "declaratory relief and injunctive relief." You had the sense that there were two functions that the courts might be called upon to play.

MILLER: The Committee conversations did not deal directly with that. It came in when (b)(3) became controversial.

ISSACHAROFF: We'll come back to that.

MILLER: There was conversation about the legitimacy of judicial intervention, whether it be in desegregation cases, or employment cases, or in the tort field. Some of the people who did not want the existing rule extended in any sense were arguing that (b)(2) and (b)(3), particularly (b)(3), might create illegitimacy with regard to perceptions about the judiciary. So it was sort of your point flipped 180 degrees.

ISSACHAROFF: Well, there was a discussion previously at this conference about why, then, couldn't you have done this through the standard rules of equity? We had class actions as an equitable device going back, under Steve Yeazell's view, to at least the 15th century, and why not just carry that forward? I've never understood what you were really thinking was going to be the end game.

MILLER: (Sigh) You sound like some of the members of the committee—

[Laughter]

ISSACHAROFF: (Interposing) Old, old.

MILLER: —who are no longer with us.

ISSACHAROFF: Even older.

MILLER: The English Chancery rules were judicial in character and rather vague. Courts in different parts of the country gave them different status and application. So formal equity rules were thought desirable. While not denominated as such, the first rule for class actions was in the equity rules of 1822. There was judicial development prior to that, including the new sets of rules in 1842 and 1912, and the Federal Rules in 1938. In other words, the class action form was there, and people like Ben Kaplan wanted to make it as usable as possible by formal recognition in the Federal Rules.

Not simply for civil rights cases, Ben and others saw it as usable in antitrust and securities contexts as well. Those were the two most obvious purely private law areas, green goods-type cases, but Ben and a few of the others also saw it as valuable in terms of small-claim-large-group cases, the economically unviable cases. Remember, the Warren Court is in the background, that's a "put up or shut up" era in terms of people beginning to demand access to the courts and equal treatment by the justice system. If as a society we really mean what we say about fairness and access to the courts, we damn well better put it in the rules.

ISSACHAROFF: This may be hindsight bias, just reading the past into a state of inevitability, but it's striking that this new rule goes into effect in 1966, and within a year or two the whole dynamic of the Court changes. We have *Swann*; we have *Milliken*. You moved to Boston, to Harvard, in the early '70s, just in time for the Boston anti-busing riots. You have the aggressive desegregation decrees and the rise of the institutional injunction. Can it be that one was just an un-thought-of byproduct of the other? You must have been thinking about what you wanted the courts to be doing...

MILLER: There were senses that things in society were developing and changing in different ways, that mass phenomena were increasing in number and increasing in character and dimension. And at the

same time, there was a sense that the Warren Court was ending, and more conservative judicial forces were going to be at play. But remember that the drafting of Rule 23 starts late in '61 and the Rule gets locked by '63, '64. So this focus on the date of '66 is a little misleading because suddenly the Civil Rights Acts are coming in, and the entrepreneurial bar is beginning to think, "Hey, if it works for civil rights, it will work for us." It's just one of those historical mismatches. If they had drafted the rule in '76 rather than '66 it might've been quite different. The massive growth of class actions was not intended. It was a product of the unforeseen social forces and doctrinal shift that went well beyond civil rights.

ISSACHAROFF: One of the ways of looking back is to say, "How has it become institutionalized, and what would the people who are putting forth the reforms have thought?" Let's take a case that we teach together, perhaps the most important class action case of the last decade, *Brown v. Plata*, which is a case about the deinstitutionalization of many convicted criminals in the California penal system.

What's striking to me is that, while it goes to the Supreme Court as a class action of all prisoners in California, and the Court splits 5-4 on whether the conditions of confinement are cruel and unusual, no member of the Court is the least bit perturbed by the fact that this is a class action. That strikes me as the complete acceptance of the vehicle as the way of organizing this kind of structural relief. Would a case of the scale of *Brown v. Plata*, the entire California penal system, have come as a surprise to the drafters?

MILLER: It would have come as a momentous surprise. I always say Rule 23 is analogous to the amoeba that ate New York. When drafted, it had a modest dimension. There was a sense that in application it would have a limited application. It has proven to have a dimension many times the size of anything conceived of by the people in that room, as bright as they were.

The best proceduralists in the United States were on that Committee. We had every significant academic proceduralist and some of the best district judges. We were constantly invaded at meetings by Judge Albert Maris, Professors like Charlie Wright and James William Moore, and others. They were on the Standing Committee, and they would come into our meetings periodically. And we knew the rule had to go through the Standing Committee and the Judicial Conference, so if the Advisory Committee couldn't draft something that

would get through those entities, it would be a fool's errand.

It was good that they came in with their perceptions, because those three were probably a third of the Standing Committee. But I'm not sure, somebody would have to tell me historically, whether by the early '60s they would have conceived of school bussing class actions, as opposed to just straight desegregation orders, pursuant to the *Brown* emendate, "with all deliberate speed."

I think they would have thought affirmative decrees were possible because certainly the academic members of the Committee, Judge Wyzanski, and Judge Roszel Thomsen of Maryland were old equity people. And, let's face it, the federal courts had been running the meat packing industry since 1920, and were running the music rights industry since the 1950s. So the notion of continuing jurisdiction over a structural decree was not unknown. But I think *Plata* really is a good illustration of what hath God wrought.

ISSACHAROFF: I think we're hearing from you that the Committee members may not have anticipated it, but it wouldn't seem so far beyond what they were unleashing as to cause them great consternation today.

MILLER: In the (b)(2) category.

ISSACHAROFF: Yes.

MILLER: I remember visiting Ben, who became a Justice on the Massachusetts Supreme Court around 1974. I lost him as a colleague four or five years after I arrived at Harvard. Every time I visited him, he was always saying, "What's going on with our Rule 23?" Sometimes he was rather astonished when I told him about some of these rather elaborate applications of the Rule, but he never dissented from the wisdom of the (b)(2). After all, what we have seen are all just extensions of the historic equity jurisdiction of the English and federal courts.

ISSACHAROFF: Okay, so let's turn now to something that has not quite eased so smoothly into our repertoire: the (b)(3). And there are two things that are striking about it. First, it was such a clear innovation. And second, the language of it is rather extravagant. It has these new terms of "manageability," "predominance," and the "desirability" of "concentration," things that have not perhaps panned out all that

well in the case law. There are a lot of cases on them, but they have not really acquired a meaning. So let's start with the origin of all this: Where did this ridiculous language come from?

MILLER: [Pause]

ISSACHAROFF: You're going to have to tell it, so you might as well do it now.

[Laughter]

MILLER: Well, only a piece of it. Before I respond to that, is our friend Bob Klonoff here today?

ISSACHAROFF: Yes.

MILLER: Hi, Bob. This came up in the conference yesterday. The Committee in the '60s was cut from the same cloth, so to speak, as the Committee of the '30s led by Charlie Clark, then of Yale Law School, who was the chief architect of the Rules.

ISSACHAROFF: And whose assistant Charles Alan Wright was your co-author. So there's continuity in this.

MILLER: Yes, yes, it's all connected, somehow. One of the basic drafting philosophies of the Committee of the '30s and the Committee of the early '60s was open textured rules: simple language, short provisions, general statements, leave it to the judges, they can fill in the gaps. If you ever take out a copy of the '38 Rules, and even a copy of the rules following the '66 revision, and lay it next to the current Rules, it's like looking at the Constitution to the right and then looking at the tax code to the left.

[Laughter]

MILLER: The style of drafting was entirely different. Back then, words were chosen that carried out this notion of generality, because, as they would frequently say, we can't see what's around the corner.

ISSACHAROFF: But it's striking that if you compare (b)(2) to (b)(3), in (b)(2) you have a very clean rule that just says for purposes of

declaratory relief or injunctions; and (b)(3), even in the '66 version, starts looking a lot more elaborate. I've known you for decades, and I know your preference for clean language. I don't recognize in (b)(3) your authorship, except for the fact that you did it, which we'll get to in a second.

MILLER: Even in (b)(2), you get generality. Look at some of the passages: "Course of conduct." "Affecting the members of the class." "Giving rise to final or corresponding declaratory relief." Even in (b)(2), you have a sense that they are not writing the tax code. The original text of (b)(3) was very general as well.

ISSACHAROFF: And so let's talk about the drafting, and then I want to talk about why you had to write so many pieces into it. So you were starting, there was some sense, as you said a minute ago, that the small value economic claims were going to come in somehow. You were going to draft (b)(3) to accommodate that. Tell us the story of the actual text drafting.

MILLER: Oh, the text drafting went over a couple of years.

ISSACHAROFF: Right, but the final—

MILLER: [Interposing] I have a feeling you're referring to a particular piece.

ISSACHAROFF: You know what I'm referring to, and you're going to make me ask it 10 times.

MILLER: No, no, no.

ISSACHAROFF: As you always do in class—

[Laughter]

ISSACHAROFF: —but I'm going to get it out of you as I always do in class.

MILLER: It's just that my story is so idiosyncratic, and in its own way, in my head, it sounds too damn egotistical. You have to understand, when the Committee started on the text of (b)(3), at least Ben and some of the others conceived of it as an elaborate joinder device.

Remember, the rule does not say who was bound by a class action. It doesn't, and it couldn't. That would be a violation of the Rules Enabling Act, they would say, and I would agree.

ISSACHAROFF: Really?

MILLER: Yeah.

ISSACHAROFF: OK.

MILLER: I don't think a federal rule can provide preclusion, but leave that to one side. It's a matter of substance. It's not—

ISSACHAROFF: [Interposing] I've seen a lot of court opinions—

[Laughter]

MILLER: Look, I don't have to teach Procedure until Monday, so leave me alone.

[Laughter]

MILLER: It was conceived of as an elaborate joinder device that would aid in the fraud cases, the antitrust cases, and the negative value cases, and there's almost a touch of consumerism in that. I don't think they thought about environment. It was just a way of aggregating people who believed they had been injured by common conduct. Then a verbal fistfight broke out within the Committee. Some people thought that (b)(3) was very controversial. Remember, this is 1961-63, no one is thinking about tobacco or asbestos or pharmaceuticals. And some of the members of the committee, one in particular quite stridently and inexhaustibly, wanted no (b)(3). Indeed, he didn't even want a (b)(2).

ISSACHAROFF: This would be John Frank, right?

MILLER: You said it.

ISSACHAROFF: Actually, Steve Burbank did, but...

MILLER: OK. John was a wonderful lawyer. He started his life on the

Yale faculty, migrated because of some health and faculty politics issues to Phoenix, and represented some of the most significant companies in the South.

ISSACHAROFF: And became one of the first heads of the Civil Rights Division. He had an extraordinary career.

MILLER: But he sure as hell didn't want a (b)(3). He gave up fighting the (b)(2), but at the beginning of the Committee's deliberations on Rule 23 he thought everything could be covered by (b)(1). And people like Ben and Judge Wyzanski, Charlie Wright was a little ambivalent initially, but Charlie Joiner and Dave Louisell, they wanted something that had the malleability to advance the class action as needed. And Ben would say that without (b)(3), in particular, the rule would be retrogressive. It would abate aggregate litigation, and the class action would not do the job that was necessary to permit small claims to be brought.

The ultimate compromise, triggered by a Wyzanski comment, was to build safeguards into (b)(3), because John Frank would always say that he was afraid of misbehavior in the (b)(3) context. He was afraid of misbehavior that would have an effect on absentees. There is a notion that is still prevalent in many nations that before you affect an individual, the individual has to be a participant in the action. It's his or her natural right to be there, and a court cannot foreclose that right.

ISSACHAROFF: Something like what the European courts have held, that there is a fundamental human right of not being bound without your affirmative consent.

MILLER: Exactly, which gives American class action judgments difficulties in many parts of the world. The most evil thing I could say about John is that I don't think John left his clients out of the discussion. John kept masking it, arguing that renegade plaintiff lawyers will start these class actions, get judgments, and hundreds of people would be bound without their participation or even their knowledge. And that's the way the debate between Ben and John got crystallized, and then the disagreement got worse and worse over meetings with a lot of back channeling.

And Judge Wyzanski just said, "Let's protect those absentees." So you end up with predominance, in other words, you've got to get a lot

of judicial bang for the buck before you certify under (b)(3). This has got to be a true efficiency economy win before you bind people with the (b)(3). It's got to be superior. God knows what that means, "superior." But it was understood to be protective.

ISSACHAROFF: I never understood it either. But I'm glad to know—

MILLER: Words like "predominance" and "superiority" were like silly putty that could be molded in any way by a judge in a particular context. And then the key became the (c)(2) notice—giving class members' individual notice. And I remember saying to Ben, who had taught me the *Mullane* case, "Why don't we just write *Mullane* into the rule," which we did. And the key was thought to be the class members opt-out right because that would guarantee that each class member had a choice to advance his or her right on an individual basis.

ISSACHAROFF: Right, but where'd that come from? Because that wasn't present in any rule before.

MILLER: No, that was a construct. I forget who proposed it within the committee...

ISSACHAROFF: Wyzanski.

MILLER: I was going to guess that it was Wyzanski. He was incredibly smart and wise. So those four things have to be written in. That encumbered the text of (b)(3) and other parts of the Rule in and of itself, and then there was a feeling that in using predominance and superiority, you have to give that some texture. And that's where the Four Horsemen of the Apocalypse are laid out in the Rule as factors to be considered by the court. The most significant in retrospect has been "manageability." Even "manageability" is a soft word that means whatever a judge might want it to mean.

ISSACHAROFF: But it's a concept which we take for granted, particularly after the '83 reforms of the federal rules, for which you were then the Reporter to the Advisory Committee. But the word comes out of nowhere at the time in terms of the Anglo-American conception of the judge.

MILLER: That was the brilliance of Ben, being able to find words to meet the situation, without over-crystallizing. It's no different than the decision made by the original Rules Committee not to use words like "fact," "conclusion," or "cause of action." They canonically banned those words because they had too much baggage on them. The 1960's Committee, in doing the (b)(3) thing, was grasping for words that didn't have baggage.

ISSACHAROFF: Right, but "manageability" not only doesn't have baggage, the concept of creating an administrative constraint on courts is recognition of an inquisitorial court-like power that is not easily found within American jurisprudence at that point.

MILLER: It simply reflected what the Committee saw, and that is the growth of the bigness of litigation. Not bigness as we now know, but bigness as they perceived it at that time. Let's face it, a Section 10b-5 stock case, or a price fixing case, can be a big case. And they also saw the birth of judicial management. That's what they saw, and they understood that the court should have discretion to say, "I can't manage that" for hundreds or possibly thousands of claimants.

ISSACHAROFF: They didn't see Judge Barbier trying to resolve 450,000 claims in a two-year period in the Deepwater Horizon litigation.

MILLER: They did not. So the drafting of (b)(3) took more time than anything else and led to the inclusion of a lot of verbiage.

ISSACHAROFF: So let's talk about the drafting. As I recall, you were a young conscript or something.

MILLER: Well, conscript is the right word. I was on active duty with the United States Army. The big Committee meeting was coming up, and, I'll use the word, Ben was "panicked." Ben had a certain fragility to him which always amused me, but it was quite human. He said, "You've got to be at the meeting; you've got to be!" I said, "I'm on active duty with the 77th Infantry Division in Camp Drum, New York." He goes to Secretary of State Acheson—

ISSACHAROFF: Acheson knew somebody in the military from his days as Secretary of State, I take it?

[Laughter]

MILLER: No, he had a better idea. Acheson knew Chief Justice Earl Warren. The Chief Justice writes a letter to the commanding General of the 77th Infantry Division. The letter actually says, “This man is needed on the nation’s business.”

[Laughter]

MILLER: I kid you not.

[Laughter]

MILLER: So they give me a pass. Ben and his wife, Felicia, had a wonderful home on Martha’s Vineyard. So it’s decided that they’ll pick me up at the Boston airport, and we’ll go to Martha’s Vineyard and work on Rule 23. So we’re now in the bowels of the Martha’s Vineyard Ferry. Now for all you hotshot technologists, I’m sitting in the back seat with a portable typewriter. It’s not even electric. Ben, who didn’t drive, is in the front; Felicia is driving. And we’re going back and forth on the drafting, and that’s literally when some of these words get incorporated in what we now see in (b)(3).

I’m clacking away in the back seat, and we’re going back and forth on words. In the middle of this, the woman in the car next to us rolls down her window, reaches over, and taps Felicia’s window. Felicia rolls the window down, and the voice from the other car said, “Are we sinking? Do you hear that sound?” And it’s the clacking of the typewriter. Felicia just points at me, and the woman is very relieved.

[Laughter]

MILLER: For me, that is an indelible memory.

ISSACHAROFF: So if the seas had been calmer, we might have gotten a better rule that—

[Laughter]

ISSACHAROFF: —that day?

MILLER: Yes, or a shorter rule.

[Laughter]

ISSACHAROFF: A shorter rule.

[Laughter]

MILLER: Yeah, I mean (b)(3) was the clumsiest, biggest, most textualized provision.

ISSACHAROFF: Right, so that's the part that strikes me, because I've known your writing for years and years, and we've taught together. It's not like you; it's got too many moving pieces, subordinate clauses. It's not clean. You don't see the flow from beginning to end. So it's written defensively, which is not your style.

MILLER: I think that's right, Sam. I think the fate of the rule was so indefinite at that point, because it wasn't just John Frank; even Charlie Wright initially had doubts about (b)(3), and a couple of the practicing lawyers had doubts. There was a concern that industrial forces would block the rule, unless somehow it was made acceptable. So I think (b)(3) is written recognizing that we had to put procedural safeguards in there, and some texture in there, and some committee members wanted more rather than less. That's what happens when you deal with Committees.

ISSACHAROFF: So the compromise was you had a lot of pieces in there that at least would force judges through a checklist of multiple safeguards.

MILLER: Yes, as nasty as that sounds, Rule 23(b)(3) and the other provisions relating to it are in effect a checklist, which was not characteristic of the Rules up to that point.

ISSACHAROFF: Right, or of you.

MILLER: Forgive me, Bob [Klonoff, who is on the current Committee], the damn rules are now cluttered with checklists, so I'm an unindicted co-conspirator in the development of that phenomenon.

ISSACHAROFF: Well, we have Elizabeth Cabraser here, also from the current Rules Committee, so we can—

MILLER: [Interposing] Oh, I'd rather pick on Bob.

[Laughter]

ISSACHAROFF: So this is an innovation. It's a controversial one, so you package it with *Mullane*, you package it with this new opt-out right. What was the paradigmatic case? What did you have in mind that you really wanted to facilitate? What did Ben think that he really wanted to facilitate?

MILLER: Well, civil rights was a given.

ISSACHAROFF: Yes, that's on the (b)(2) side. You haven't seen the damages cases yet for civil rights.

MILLER: That is right, and, boy, if you go back to the text of (b)(2), there's a lot of truth in what Justice Scalia said. I hate to admit it, but the difference between a negative and an affirmative injunction is just not in there. And the (b)(3), they saw the antitrust and the securities cases, and they clearly saw, or at least Ben clearly saw, the negative value cases. They did not see environmentalism, or product safety, or privacy. They didn't really see consumerism. I think anyone who has read any of transcripts of the meetings realizes that they never talk about subject matter jurisdiction issues and that they never deal with the question of the diversity case and whether you could aggregate small claims to meet the more than \$75,000 requirement. But, of course, that is beyond the rulemaking power.

ISSACHAROFF: Or \$10,000 at the time.

MILLER: \$10,000 at the time, right. Beyond that, odds and ends.

ISSACHAROFF: Let's take the antitrust case as the example. What was the concern? Because in an antitrust case you have attorney's fees in the statute; you have treble damages; you have aggregation facilitation devices already built into it.

MILLER: There, again, they were concerned about small claim antitrust cases, wholesalers, for example, or even small retailers who individually could not proceed against a mega corp. And, let's face

it, they were proceeding under the assumption that whatever they put into Rule 23 would in fact have bilateral binding effect, although they never say so in the rule. So they saw the use of the class action as gaining that type of efficiency and economy for the system and for defendants as well as plaintiffs. The rule represents an affirmative validation of multiparty joinder. But Johnny Frank saw it as an attractive nuisance that might encourage too many cases.

ISSACHAROFF: So could we use some modern language and say that the primary concern was effective vindication of the substantive law in areas like antitrust, with the small players there?

MILLER: It's '61 to '64, effectively, that we are talking about. The bar is not polarized the way it is today. You go through the list of Committee Members. You don't see a plaintiffs' lawyer in there, because nobody thought about the dichotomy between plaintiffs' lawyers and defense lawyers. There were large-firm practicing lawyers; there were judges; there was Archie Cox; there was Abe Chayes representing other branches of the government. They wanted it to be effective and final, leaving finality to the growth of preclusion law. But it was not polarized in the plaintiff/defendant sense. That wasn't one of the dynamics in that room at that time. And very few comments came in from the outside world.

ISSACHAROFF: But it's interesting—if you think about *Italian Colors*, for example, and Scalia's opinion there, that opinion is so directly on point to what you're describing as the central concern at the time, and now the substitution of individual arbitration really is in direct tension with the objectives in 1966.

MILLER: Absolutely. Arbitration was not on their minds. If you asked me, I think some of them would be horrified by *Concepcion* and *Italian Colors* as a fundamental imposition on the judicial system and a transmogrification of the Arbitration Act that was not meant for employment or consumer cases.

ISSACHAROFF: And, as we know, we live in a different world now, where there is an established plaintiffs' bar. There are securities lawyers or antitrust lawyers. There are, increasingly, after CAFA, consumer class actions being brought. What would have shocked them,

besides the sheer entrepreneurialism of it all? What would have shocked the Committee?

MILLER: Scale. There was a secondary verbal fistfight about mass accident cases. They would be shocked by the scale of today's cases. The notion of the *Castano* national tobacco case would have boggled their minds. Walmart would have been beyond their conception in those days. Many people in that room didn't think they were writing a rule that really had significant application in the tort environment, yet they talked about fraud actions, which is ironic because the key element of fraud is reliance which is individualized. But they talked as if fraud cases would be natural (b)(3)s. But that was the outer perimeter of their vision in terms of the rule's scope.

ISSACHAROFF: Right, so let's turn to that, because I think that there is a tendency to read from the present debates into the past. We've put a lot of freight on the predominance issue, and so the reason that mass torts don't fall into class actions easily is generally thought to be that they can't get over the predominance hurdle because there are too many individual issues. As you say, fraud, until we have presumptions of reliance develop as a substantive matter, would also not fall into easy predominance of a common inquiry.

But they had the idea of mass torts, and so there's this curious line in the Advisory Committee notes, "of course, nothing herein shall affect tort cases."

MILLER: No, that's not the line.

ISSACHAROFF: OK. I'm paraphrasing, but go ahead.

MILLER: It's just mass accidents not usually being appropriate for certification, something like that. There was a controversy about the language of that passage in the Advisory Committee notes.

ISSACHAROFF: So why don't you tell us about that, because it comes out of nowhere, and there's no other part of the Committee notes that seems to say, "Oh yeah, we're holding off on this particular substantive area here."

MILLER: Even though the meetings were held in closed rooms, elements of what was going on would get out. And there was concern

about opposition to the rule, any rule, higher up the rule-making channel. It was assumed that various influences might play on the Standing Committee or Judicial Conference, let alone the Congress. John Frank constantly threatened or voiced the opinion that unless mass torts, or mass accidents as they were called, were excluded from the rule, there would be opposition to the promulgation of the rule from the insurance industry and other corporate interests. That was not said in open meeting; it was said several times over lunch or dinner or the telephone.

And there was a fear that that could kill everything they were doing. There was even a representation that unless mass accidents were excluded, certain members of the Supreme Court would oppose the rule. The Committee quite properly refused to put anything in the rule. There was a stronger sense of the trans-substantivity of the Federal Rules then than now. So they decided to put it in the Advisory Committee Notes. I do not know, to this day, and no one will ever know I guess, whether these representations about opposition were true or false, or whether conversations were ever held between John Frank and a couple of those he mentioned. I do not know, but it's quite clear those representations had an impact on the Committee.

ISSACHAROFF: So let's go back to that period. We did not have the mass torts that we have now, but you had airplane crashes back then, more then than now. You have, in the same period, coincidence that long before '66 the rule was locked in, but a year later you have the *Tashire v. State Farm* case where the Court intriguingly at the end of the opinion says, "Yes, maybe this should be under interpleader, but we think not. We've got to do something about mass torts, but we don't think interpleader is the right vehicle." So people were thinking about where these cases were supposed to end up, and what was the thinking? Where should they be? If they shouldn't be Rule 23, according to some, because you bind, what was the other view? Where should they be? Clearly with an airplane crash, you have to resolve a common issue, right?

MILLER: Yes, but the air crash or the mass accident impacts almost by definition human beings in a direct, physical way. That was the strongest core of the right of individuals to pursue their grievances on their own. They shouldn't be co-opted into a nameless, faceless mob of people. That was very powerful, even though that notion was starting to tail off. Also important was the notion that those cases can

all be handled by contingent fee, that they were simple and would take care of themselves. Or, if you wanted to be cruel, there may have been people in the room who really just didn't give a damn about those cases.

Most of the lawyers on the Committee, I'd have to go back and look at the list, were commercial lawyers. They were litigators, but primarily in the commercial context. But the mass tort issue sure as hell scared people off for a while.

In another anecdote, I got a call one day from the judge handling the Kansas City Hyatt skywalk collapse. He calls me up, and he says, "I've got a fight between some East Coast lawyers who want to pursue it on a class basis and a bunch of Missouri and Kansas lawyers who want to pursue it on an individualized basis. I've read the Committee note," he said, "but this sounds like a class action to me." I opined that it was a perfect class action. And if you stop and think about it, you've got a lock on predominance and the other class action requirements. In a way it is very much like a crash case. So I contributed to that inappropriate *ex parte* communication and encouraged his certifying it as a class action. He did, only to be reversed on a questionable basis.

ISSACHAROFF: Right, but there was that, and there was the Puerto Rico hotel fire. The thing that strikes me about the airplane crash or the skywalk case is the commonality of the issues. In the skywalk case, the question was whether the bolts were put in this way or that way, and that issue doesn't depend on who the plaintiff is. That's a fact that has to be determined. And in the airplane crashes, was it pilot error or a malfunction of the system? Was it a design defect? And courts were confronting that problem of these kinds of common issues.

Tashire talks about that, that the ultimate issue is who is negligent, the pickup truck driver or Greyhound? And there's nothing that an individual is going to add to that inquiry. There may be damages down the road, but those central issues are common across plaintiffs. So what was going to happen with those cases? They were just going to work themselves out?

MILLER: They'd work themselves out. The contingent fee bar, particularly in the air context—that was a defined, powerful bar—they could take care of themselves. And although there were no plaintiffs' firms of the style of Elizabeth Cabraser's firm back then, there were very powerful individuals and small plaintiffs' groups, so they could

take care of themselves. These cases were not negative value cases. I have a feeling that—I can't remember—the Advisory Committee Note was phrased as cautionary and not in absolute terms, and it left some room for a judge to certify a single-event mass accident case.

ISSACHAROFF: Let's jump to today, and the question is what would be most shocking. Let's take three of the cases that are floating around now as class actions. You have *BP*, which is scale beyond anybody's wildest imagination. You have *Volkswagen* also, but *BP* is tort-like activity of an economic consequence primarily. *VW* is tort-like activity, but a purely economic and environmental consequence. And then you have *NFL*, which is tort-like activity of a tort-like consequence. Which of these would be unacceptable? Acceptable? What would be shocking? Or they all would be?

MILLER: Well, leave scale to one side because the scale of all three cases would shock them, all of them. But they'd get over that very quickly, I think, because it's just scale. Throw another body in the class—who cares?

ISSACHAROFF: Unless it's your body.

[Laughter]

MILLER: I wouldn't mind having my body thrown into a class—but I think *VW* is the easiest case, since it's purely economic.

ISSACHAROFF: And it's a government agency. All those complications you could extrapolate up and scale up to that?

MILLER: You could. That's a scale question, nothing more, because the case is a single issue. Liability is acknowledged, so it is only about damages. I think *BP* is next in the scale. There are tremendous variations following the disaster that occur over time. The spill lasted, I think I heard Judge Barbier say, 87 days or something like that. So you're moving to that predominance/no predominance line in that case. So I think that one might go either way.

NFL, I think, is the hardest. I don't think you would have gotten the class certified. Indeed that's why I wrote a couple of op-eds saying the settlement should be accepted by the class members. In that case the circumstances of each individual varied; it's physical injury; it's happening over time; it's a nascent science with tremendous uncer-

tainty reminiscent of the Agent Orange case. And that's why Jack Weinstein granted summary judgment against the opt-outs in Agent Orange following the settlement.

So that's the way I would scale those three. I think the committee really would have had trouble with the *NFL* case.

ISSACHAROFF: So let me push on that a little bit, because you mentioned the opt-out was kind of added on as a notion of individual protection. And one of the things that we're seeing is many more media of participation by class members. So it doesn't look so much like you're bound in abstention. You now get active participation through Facebook, through Twitter accounts, out of everything that is done in these cases. Would they anticipate that the class action could be a participatory event, as it were? As opposed to simply the idea that there's a lead plaintiff and a lead lawyer, and everybody else is passive and is just sitting back being represented? I mean, they couldn't have anticipated the technology, obviously...

MILLER: The rule does contemplate a right of intervention. Whether they actually thought people would intervene, I have my doubts. I doubt that they saw the class action as a series of town meetings. But they wanted to create the possibility of participation.

ISSACHAROFF: Let me close out by asking about three discreet topics that are of significance today and are developments as the rule has been implemented. The first is, we've talked about before, you were the ALI reporter for the Complex Litigation Project, which mostly tried to get cases better teed up across federal-state divides for trial. And then I was a reporter for the ALI on the Aggregate Litigation Project. The big change between the two was that you were heavily trial-focused, and our project was largely designed to legitimate and push further on the settlement process, acknowledging what class actions had become: a very big bill of peace and the mechanism for the resolution of very complicated, large-harm cases. And so what was settlement? Was there any discussion of a "settlement possibility"? A settlement class? This institutionalized bill of peace?

MILLER: God, no, no, no, no. I mean, one might find references to settlement with the judge's power to settle. But that was not part of the discussion. I think they were conceiving the rule as a trial-ready rule. Remember, the word "settlement" did not exist in the Feder-

al Rules of Civil Procedure until 1983, when as the Reporter to the Advisory Committee I put it in the redraft of Rule 16. Settlement back in the early '60s was thought as being a non judicial function. Judges simply did not involve themselves with settlement. Indeed, as late as the selling of the '83 changes, I would wander around to judicial conferences and meet lots of judges who would say, "I will never sully my hands by being involved in settlement." So that was not in the thinking of the Advisory Committee in the early 1960s.

ISSACHAROFF: And now they're sullied.

MILLER: That's one of the biggest changes in the latter half of the 20th century, the shift from adjudication to judicial management.

ISSACHAROFF: Right, and the class action has been almost the poster child for this, because few class actions go to trial. Few of anything go to trial. But here you have to create a decree at the end, because the preclusive effect is binding on absent people, and so the judicial involvement is critical, and the judicial role in settlement is subject to exacting appellate scrutiny the way it isn't in other areas of law. So this is a real change in the role of the courts as a result of the (b)(3). The opt-out rights, and now we have the whole 23(e) settlement apparatus—

MILLER: [Interposing] No, but they did put it into 23(e).

ISSACHAROFF: Right. And so, what were they thinking about that? Because there's language there, right from the very beginning, that's a placeholder for this, if you will.

MILLER: No, they didn't perceive that in this context judicial involvement was necessary. I don't know how many people read Judith [Resnik]'s draft, but she puts a lot of weight on the *Mullane* case. And there's a touch of judicial involvement in the *Mullane* case in the appointment of the representatives for the principal beneficiaries and the interest beneficiaries. And 23(e), at the time of the 1966 revision, speaks of dismissal or compromise, not settlement.

ISSACHAROFF: So let me ask you about another drafting quirk that appeared from the beginning. In the last five years or so you had a number of appellate courts that have promoted the use of issue

classes. And you've had this provision in 23(c)(4) that sat there for decades, as best I can tell, never being used. And now, all of a sudden, it has sprung to life. It just lay dormant, as it were. What were you thinking when that went in? And why was it in (c) and not a form of class action in (b)? What was it supposed to do?

MILLER: I hate to say this—

[Laughter]

MILLER: —but although I absolutely applaud what's been done in the Second and Seventh, and a little bit in the Ninth Circuit—

ISSACHAROFF: [Interposing] And the Sixth, and a little in the Fifth, and I think Third a little bit. It's spreading.

MILLER: I think the so-called issue class is wonderful. I don't think it would ever have passed a Justice Scalia inquiry, though, because it is in (c). It's in (c). Let me back up a bit. I don't think the provision ever was really discussed in open meetings.

ISSACHAROFF: Where'd it come from?

MILLER: It came from the notion, I believe, this is my best recollection, that they wanted to give the judge power to certify less than the full class. Remember subdivision (c) is a garbage can filled with procedural devices empowering the district judge to do various things.

ISSACHAROFF: But all rooted in some equitable notions.

PROFESSOR STEPHEN BURBANK: [From off stage] That's an interesting view of your field.

[Laughter]

MILLER: Well, that's what my field of sports law is—it's a garbage can. You find interesting things in garbage cans, Steve.

[Laughter]

MILLER: You should try some rummaging.

[Laughter]

MILLER: No, I think what they had in mind was a case certified under (b), with a decision by the judge to treat less than all of it, maybe a single issue of it, on a class wide basis, and then issue a decree or a judgment that applied class wide on that issue. I think (c)(4) was in early drafts, and it remained there before all of the bric-a-brac for (b) (3) cases was put in.

ISSACHAROFF: But where did this come from? It doesn't seem to correspond to anything that came before, except vague notions of equity.

MILLER: Yes. Yes. It's what I said almost at the beginning of this conversation. There was tremendous respect among Committee members for the equitable powers of a federal judge and the flexibility of those powers. And (c) is designed to encapsulate some of them and provide a bit of a procedural road map.

ISSACHAROFF: Let me ask you—we're at the end now—I want to ask you about something that came up, and we had an extraordinary last panel yesterday, a discussion of the way the law is being pushed in the mass tort context. There's a term that's used now: these "epidemiological cases," that is cases that you can't prove on the individual level; you need to go into bigger aggregations. I recall that when I started the Aggregate Litigation Project, at the very first advisers' meeting, which you attended, Jack Weinstein in his inimitable way gets up and says, "You're all wasting time. This is all useless. The real question is how we're going to get the procedural rules to accept the nature of proof, that the proof nowadays is all epidemiological, all statistical." This came up in the *Tyson Foods* case in Justice Kennedy's opinion. Was this on the horizon, now that you were unleashing many more of these cases in different styles? Was the sense that the proof itself, the nature of liability, was going to start turning on the aggregation proper?

MILLER: No, no. Thinking about the people in that room, I don't think even Ben, who was among the most avant-garde types in the room, was thinking about that. Maybe Judge Wyzanski might've been thinking about that, but a Charlie Wright would not have been thinking about that, a Roszel Thomsen would not have been thinking about that. You've got to go back to '61 to '64. That would have been

revolutionary. These were people truly committed to the adversary system, and if you go through 23 as promulgated in '66, it reflects a commitment to the adversary process. It does not reflect a commitment to judicial management, and it does not reflect commitment to science or epidemiology. I don't think that was on the mind of anybody in that room.

ISSACHAROFF: It's just fascinating, Arthur, because I understand that you can't project the future back to the past, but you're sitting there in the early '60s, and realistically all hell is about to break loose. You're going to get the injunction cases. You're going to get federal judges being demonized in community after community. You're going to have to get institutional responses from the judiciary. You're going to get Supreme Court cases deciding whether injunctive powers can allow you to replace the elected officials of Yonkers.

MILLER: Everybody was pretty dumb, huh?

ISSACHAROFF: No, it wasn't dumb, it was just—

MILLER: [Interposing] Shortsighted, huh?

ISSACHAROFF: Eh, maybe, maybe.

MILLER: Lack of vision, like most of us the night before the presidential election.

[Laughter]

ISSACHAROFF: Yes, perhaps. But it's a snapshot on a moment where the world was changing, and you unleashed powerful reform impulses, and it was a rather conservative group of people that did this at the end of the day. As you said, Dean Acheson is about as American establishment as you can get in that period.

MILLER: Oh, yes, yes, by any contemporary standard, the Committee members were Stonehenge types. And Acheson gave Ben tremendous freedom. And a lot of this was Ben. A lot of it was Ben supported in significant part by Wyzanski. Look, there was talk yesterday, and I think Steve Burbank led a little bit of discussion, about the fact that there was this gang in Chicago working on

what became the MDL process. And, God, the biggest non-sight was MDL and the fact that the *Manual for Complex Litigation* is in the early stages of being put together. Why? It's '63 or '64, and the Committee pressured Ben and Al Sacks to go talk to Phil Neal and the Chicago gang. They didn't want to go, but they felt that there was enough sentiment in the room that they were obliged to go. But that was a nonstarter. That was '63. The MDL statute doesn't come in until '68. So when Ben and Al come back from the meeting, it's obvious. Who knows what's going to happen with that Chicago thing or when. Will it ever be enacted? It sounds like a teeny weeny, and we have our own agenda and timetable.

BURBANK: Yeah, but they did put superiority in the rule as a result of that meeting.

MILLER: Yeah, and that's it. Because the Committee had an agenda, and it had a timetable, and it couldn't sit around, hold up all of the joinder rule revisions, and wait to see whether or not the MDL would be enacted by Congress. In fact, it wasn't for four more years after the rule was handed off by the Committee.

ISSACHAROFF: So, Arthur, we're out of time, and I just want to finish on one question, which is: We both made our careers as teachers and/or students. Part of this that keeps coming up again and again is the extraordinary shaping influence on your entire career of the fortuity of your relationship with Ben Kaplan. It really, at every level, is your introduction into this world as a student, and then as a research assistant, and then into the rules process and legal reform. It's a career-shaping experience. Is it possible to imagine your career differently?

MILLER: Yeah, I could still be in the Army.

[Laughter]

ISSACHAROFF: Actually, I'm sure that's not true. But anyway...

[Laughter]

MILLER: I always say that Ben was my mentor, as I would say Jack Weinstein also was a mentor. And Ben would always say, "I claim no

responsibility for you.” No, look, I spent almost my entire teaching career in civil procedure and copyright, which is exactly what Ben taught. He was an Advisory Committee Reporter; I was a Reporter. We both had a love of process. He probably did not like the fact that I went into television. He probably thought I should have ended up as a judge. But Ben and Jack shaped my life. And I’m very, very, very grateful to both of them.

ISSACHAROFF: Well, on that note, Arthur, as always, it’s been a pleasure.

[Applause]

[END RECORDING]

